UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, THE STATE OF NEW YORK, *ex rel.* ASSOCIATES AGAINST OUTLIER FRAUD,

Plaintiffs,

v.

HURON CONSULTING GROUP, INC. and EMPIRE HEALTHCHOICE ASSURANCE INC., (D/B/A/ EMPIRE MEDICARE SERVICES),

Defendants.

No. 09 CV 1800 (JSR)
ECF

DEFENDANTS EMPIRE and HURON REQUEST TO TAX COSTS PURSUANT TO LOCAL RULE 54.1

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' REQUEST TO TAX COSTS

INTRODUCTION

The Defendants Empire and Huron, as the prevailing parties in this litigation, have sought awards of "costs"/"expenses" from whistleblower Steven Landgraber's relator, Associates Against Outlier Fraud ("Plaintiff").[1] Plaintiff opposes these requests in all respects, based on the False Claims Act's (31 U.S.C. Sections 3729, *et seq.*) ("FCA") protections afforded to losing plaintiffs, as established by 31 U.S.C. Se ction 3730(d)(4), *to wit,*

"... [T]he court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for the purposes of harassment."

[1] Due to the almost identical nature of the herein Whistleblower cases brought against Empire and Huron, as well as that both Defendants were dealt with at the same District Court's hearings and the Court's single opinion dealt with both Defendants, in the interests of brevity, Plaintiff submits this one memorandum to cover both Defendants, making note of matters that are unique to only one of the Defendants. The Clerk of Court has scheduled separate hearings for each Defendant, Empire at 1:00 p.m. on September 10, 2014 and Huron at 11:30 a.m. September 12, 2014.

In this case, undisputedly, the Plaintiff is entitled to the protections of 3730(d)(4), since his actions were not frivolous, etc., a proposition that Defendants have neither challenged nor raised. However, because the term "expenses" but not the term "costs" is found in Section 3730(d)(4), the Defendants seek to obtain awards – exceedingly punitive the Plaintiff believes – on grounds that an award of "costs" is not barred or covered by Section 3730(d)(4). Plaintiff contends, however, based on the overwhelmingly weight of case authority, legislative history, the clear intentions of Congress and unchallengeable logic, the terms "costs" and "expenses" in the context of the FCA mean the same thing, have never been shown to have different meanings and are interchangeable in all Section 3730 respects.

United States ex rel., Atkinson v. Penn. Shipbuilding Co., 528 F.Supp. 2d 533, 537-8 (E.D. Pa. 2007), is a case virtually on all fours with the instant case. Having found that the plaintiff's conduct was not "frivolous," the defendants could not recoup their expenses under Section 3730(d)(4) (the defendants did not make a motion for "costs," presumably because they concluded that since Section 3730(d)(4)'s terminology covered "costs" as well as "expenses," a motion for "costs" would be futile.[2] That Court endorsed the overwhelming view that "that the general intent of the [FCA's] 1986 amendments . . .was to encourage persons with first-hand knowledge of fraudulent misconduct to report fraud . . . [and that] "to take the further step of assessing attorney's fees against plaintiff simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions . . . [of the FCA]." (*Id.* 546).

[2] The parties' memoranda in *Atkinson* (its docket entries are found at Pacer, 2:05-cv-02498-ENV-MLO) submitted to the Court spoke in terms of "costs," not expenses" in determining that 3730(d)(4) precluded an assessment against the Plaintiff.

If the Clerk of Court were to disagree with Plaintiff's position on the applicability of 3730(d)(4) to "costs"/"expenses," he presents, arguably only (because Section 3730(d)(4) blocks any award of tax costs), his hypothetical fall-back position. In that regard, Plaintiff asserts that Defendants do not qualify for most, if not all , the awards for "costs" that they seek. The issue herein concerns whether the to presence or not of the term "costs" within Section 3730(d)(4) controls the Defendants' eligibility for awards that pertain to the Defendants' expenses for depositions (both Empire and Huron) and expenses for the copying of documents (Huron only).

I. SECTION 3730(D)(4) PROHIBITS AN AWARD TO DEFENDANTS FOR "COSTS."

The prohibition on assessments of "costs," *per* Section 3730(d)(4), against a non-frivolous FCA Plaintiff is quoted above. A large number of cases, including opinions by the United States Supreme Court, have explicitly or impliedly recognized the interchangeability of the terms "costs" and "expense," and, hence, have clearly held that whether an expenditure is designated by statute an "expense" or a "cost," a non-frivolous whistleblower-loser in the litigation he/she brought cannot be assessed for such a "cost"/"expense."

In *Pugach, et. al. v. M&T Mortgage Corp,* 564 F.Supp. 2d 153, 154, 164-5 (E.D.N.Y. 2008), the Defendant's motion to dismiss plaintiff's claims under the False Claims Act ("FCA"), 31 U.S.C. Section 3729, *et seq*), was granted and further, it held that an award of attorneys' fees and "costs" pursuant to 31 U.S.C. Section 3730(d)(4) were appropriate, "because plaintiffs had brought and maintained a [clearly] frivolous action and had done so vexatiously." Absent such findings, an award of "costs" - referred to as "expenses" by the statute *but not the Court* – would not have been allowed. "Costs" (such as attorney fees) were awarded by the Court. In issuing its holding, the Court's view was that Section 3730(d)(4) pertained to "costs," although the statute used the term "expenses" and made no mention of "costs," obviously, intermingling these two terms, which are, *per* their definitions and virtually everyone's plain understanding, indistinguishable. "The facts underlying the award of fees and *costs* are set forth in the October 8 order . . ." (*Id.* 154.) (Emphasis added.) The Court did refer to 28 U.S.C. Section 1920 and Local Rule 54.1 and their uses of the term "costs," limiting them to "taxable costs," but also recognizing that under Section 3730(d)(4) nontaxable *costs* were relevant to the issue. In awarding "nontaxable costs," the Court solely relied on Section 3730(d)(4), despite the absence from 3730(d)(4) of the term "costs." Moreover, the Court held that, "[a]s to the *costs* of electronic research, the Second Circuit has recognized that such *costs* . . . " (*Id.* 165) (Emphasis added.) It had no issue about "costs" omission from 3730(d)(4).

In *Atkinson, supra,* the Court's amply apparent view was that "costs" and "expenses" in the context of 3730(d)(4) were indistinguishable, ruling that ". . . Congress intended the standard under Section 3730(d)(4) to reflect the standard under [28 U.S.C. Section] 1988 . . ." when deciding whether to award "attorney fees and expenses." (*Id.* 540 and 543.) Section 1988 makes reference only to "any costs;" *it does not use the term "expenses.* To bolster its conclusion that equated "costs" with "expense," the Court relied on 28 U.S.C. Section 1988. In this Court's view, "costs" and "expenses" were synonymous, interchangeable terms, and it used them as such.

Atkinson, supra, demonstrated the interchangeability of the two terms, "costs" and "expenses." The litigants there cited to the Court 28 U.S.C. Sections 1919 and 1920, both of which used only "costs," not "expenses." In the annotations provisions that set forth a history of the Section 1920, it advises that "costs" and "expenses" were used to convey the same meaning, *i.e.,* “expense categories constitute taxable costs” and “Rule 54(d) thus provides no sound basis for casting aside ordinary meaning of various items enumerated in the ‘cost’ statutes . . .”

Section 2412’s title is “Costs and fees.” Its explicit language makes clear that“ costs” and “expenses” have the same meaning. For instance, Section 2412(d)(2) defines many concepts, including “fees and other expenses” to mean “reasonable *cost* of any ..... “. (Emphasis added.) Nowhere does Section 2412 need to define its *multi-used* term “costs,” notwithstanding that in Section 2412(e) the statute refers to “any costs, fees and other expenses, and 2412(f) also relies to “costs” when it discussed United States’ appeals from “an award of costs or fees and other expenses.” The non-necessity of having to define “costs” leaves only one interpretation: “costs,” if the term had been defined, would have been defined to have the same meaning as “expenses.” *Also see*: 28 U.S.C. Sections 1924 and 2412, used “costs” and “expenses” interchangeably. That tracks the entirety of United States’ statutes that *nowhere* is it articulated or suggested or set forth that there is a difference in the meaning of “costs” and “expenses.”

Many Courts, when ruling on FCA cases, have accepted the notion of the interchangeability of “costs” and “expenses.” In *United States ex rel. Kelly v. Boeing*, 9 F. 3d 743, 752 (9th Cir. 1993) (“Also, a relator who pursues a frivolous action can be ordered to pay the defendant’s *costs* and attorney fees.” (Emphasis added.) No mention is made of “expenses, because “costs,” understandably, is an acceptable and same-meaning substitute.); *United States ex rel. Rosner v. WB/Stellar*, 739 F.Supp. 2d 396, 409 (S.D.N.Y.2010) (“Nor is there evidence that Rosner’s suit was primarily intended to vex or harass . . . Accordingly, IPN may not recover attorney’s fees under section 3730(d)(4).” No attempt was made to recover “costs,” because all parties, Plaintiff presumes, have understood that Section 3730(d)(4) was a complete bar to recovery of all "costs"/ "expenses," notwithstanding a number of competitive statutory provisions, *supra,* that provide for awards of *costs,* but, plainly, not in situations that involve a non-frivolous FCA plaintiff. After all, defense counsel would have sought any appropriate authority to acquire costs for their prevailing client); *Mikes, et al. v. Straus*, 274 F.3d 687, 706 (2nd Cir. 2001) ("Similarly, a defendant is entitled to attorneys' fees for only those particular claims of a plaintiff deemed to be frivolous." Again, the only reasonable conclusion as to why the defendants did not seek to recover "costs," of any type, taxable and nontaxable, was that Section 3730(d)(4) barred such an attempt); *United States ex rel. Schweizer v. OCE, et al.*, 772 F.Supp.2d 174, 177, 181 (Dist. of Col. 2011 (a decision by widely respected Chief Judge Lamberth in a case in which the non-prevailing whistleblower-plaintiff's claim "is not 'clearly frivolous, and defendants have not shown that it was brought 'primarily for the purposes of harassment.'" Thus, this was a case in which an award for costs was precluded by Section 3730(d)(4)'s bar to recovery. In its full discussion of this issue, the Court addressed it, in the first instance, as a request for "attorneys' fees and *costs*" [emphasis added], with no mention of "expenses," yet, in its ruling at the end of the opinion, the Court, relying upon the interchangeability of the two terms, denied the defendants' "request to award attorneys' fees and *expenses*." (Emphasis added.) Obviously, the Court found that "costs" and "expenses" could be used interchangeably, both had same meaning.)

In *United States ex rel. Rafizadeh v. Continental Common, et al.*, 553 F.3d 869, 875 (5th Cir. 2008), the Court addressed the motion for "attorneys' fees, costs, and expenses . . . [cautioning that] the award of fees under the false claims act is reserved for rare and special circumstances." In this FCA case, the Court relied entirely on Section 3730(d)(4) to determine whether any fees, *including costs*, were awardable, and found that, because the litigation was not vexatious, a denial of all fees, including "costs of any nature," were ordered. In making its ruling, including a denial of *costs*, the Court made no distinction between Section 3730(d)(4)'s "expenses" and Section 1927's "costs" in terms of an entitlement to an award for "expenses" and "costs." The Court's ruling was based solely upon Section 3730(d)(4) to dispose of the claims for *"costs,"* finding no basis to consider that the *"costs"* sections, such as Section 1927, contradicted the clear denial of an award of *"costs"* by the "expenses" provision of Section 3730(d)(4). *In accord: AIG Global, et al. v. Banc of America*, 2011 U.S. Dist. 1567, *6, *8 (S.D.N.Y.), a non-FCA case in which the Court designated as "expenses" the *"costs"* covered by the *"cost"* provisions 28 U.S.C. Section 1920(4) and Local Rule 54.1, and thereafter, in a recognition of clear-cut *costs versus expenses* interchangeability, called them *"costs."* "The local rule, however, transparently pertains to 'costs" . . .; *Onnen v. Sioux Falls, et al.,* 688 F.3d 410, 415 (8th Cir. 2012), directing an application of Section 1988's standards to FCA cases including, certainly, the applications of 3730(d)(4).

III. CASES ESTAB;SH THAT TO PLAINTIFF'S POSITION ARE CONTRADICTED AND CONTRADICTORY, AND OPPOSED BY A GREAT WEIGHT OF AUTHORITY

A few isolated decisions have ruled, when handling a FCA cases, that, since Section 3730(d)(4) does not explicitly mention *"costs," "costs"* may be recovered despite the absence of a 3730(d)(4) finding of "frivolous," etc. *United States ex rel Ritchie v. Lockheed Martin et al.,* 558 F.3d 1161, 1171 (10th Cir. 2009). However, this unsupported *sua sponte* ruling cites no authority whatsoever other than a speculative literal reading of the statutes. Such a ruling is nonsensical; there is no definitional difference between "costs" and "expenses" - the Court apparently abandoned any effort to articulate a definitional difference between the two terms. Furthermore, many Courts - including the United States Supreme Court (*see infra*) - have recognized the total transparency between "costs: and "expenses," a notable rejection of *Ritchie*. A ruling similar to *Ritchie's* was made twenty years ago in *United States ex rel. Lindenthal v. General Dynamics,* I61 F.3d 1402 (9th Cir. 1995.

As with *Ritchie*, *Lindenthal's* ruling chose to disregard what appears to be a bar put in place by Section 3730(d)(4) to an award of "costs" in FCA cases in which the plaintiff's case was neither frivolous, vexatious nor done to harass. But that Court, too, had misgivings about its analysis, acknowledging that "the question is close." (*Id.* 1413.)

In *Lindenthal*, the Court makes the same argument as did *Ritchie*, that though the plaintiff did not engage in Section 3730(d)(4) vexatiousness, since several subsections of Section 3730 expressly mention "costs," while its subsection (d)(4) does not, in its opinion, "'costs,' under the FCA, are not a subset of 'expense.'" (*Id.* 1413.) While *Lindenthal* concluded that costs "constitute a category distinct from expenses," it was unable to express any manner in which "costs" and "expenses" actually were distinct from each other. (*Id.*) Furthermore, *Lindenthal* recognized that other cases, including from its own circuit and the United States Supreme Court, differed from in their handling of the "costs"/"expenses" conundrum.

In its discussion of *Kelly v. Boeing Co.*, 9 F.3d 743 (9th Circuit 1993)'s, *Lindenthal* conceded that there was language in *Kelly* (at its page 749) that "would support the position that 'costs' are included in the term 'expenses" and may only be awarded upon a finding of frivolousness or vexatiousness." (*Id.* 1413.) But, it seemed to cavalierly dismiss the holding as "imprecise word choice" while *Lindenthal* offered no language to explain how "costs" differed from "expenses, and *visa versa*. Also, *Lindenthal* might have confronted the issue once it acknowledged that the United States Supreme Court's analysis of the "costs"/"expenses" had, like other courts, "used language that might give rise to an inference that costs are a subset of expenses." (*Id.* 1414.) But, *Lindenthal* remained silent rather than defend its position. *See, e.g. Crawford Fitting Co. v J.T. Gibbons, Inc.,* 482 U.S. 437, 441-41 (1986)." The Supreme Court's view cannot be ignored, as *Lindenthal* attempted to do, since the highest court of the land had given considerable attention to the subject of "costs" when it dissected and analyzed Section 1920 and Rule 54(d). In point of fact, the Supreme Court found that "Section 1920 enumerates expenses that a federal court *may tax as a cost* under the discretionary authority found in Rule 54(d)." (*Id.*) (Emphasis added.) *Crawford Fitting, supra* at 752, recognized that "a relator who pursues a frivolous action can be ordered to pay the defendant's *costs* and attorneys fees." (Emphasis added.) The Supreme Court found no need to rely upon or seek out the term "expenses" to make this holding. Inexplicably, rather than supporting its own decision in the face of a Supreme Court contradiction, *Lindenthal* backtracked. It held that "The question in our case is not whether, as a general matter, costs are included in expenses," *but that IS the question.* (Emphasis added.) (*Id.*) Basically, the disapproval of the Supreme Court caused *Lindenthal* to remove itself from the cost/expenses debate. Thirteen years after its *Crawford* ruling, the Supreme Court reiterated, this time in *Vermont Agency, et al. v. United States ex rel Stevens,* 529 U.S. 765, 770 (2000), the same position as it held in *Crawford* concerning costs/expenses interchangeability.

In a case similar to *Ritchie* and *Lindenthal*, namely, *United States ex rel Costner et al. v. United States, et al,* 317 F.3d 889, 890 (8th Cir. 2003), it was espoused that Section 3730(d)(4) did not pertain to "costs," but also realized that it was obliged to wrestle with the Supreme

Court's *Stevens* opinion that "costs" and "expenses" were interchangeable. *Costner* recognized that *Stevens* supported the proposition that "costs and expenses are interchangeable terms." In *Stevens,* the Court, in discussing FCA Sections 3730(d)(1)-(2), it pointed out that the terminology that was used was "expenses, fees, and costs" and no need existed to refer to "expenses." *Costner's* recognized, *supra* at 890, that, based on *Stevens,* "the [Supreme] Court noted that a prevailing relator may recover 'attorney's fees and *costs,. . ."* (Emphasis added.) Undisputedly, the Supreme Court endorsed the notion that that the terms "costs and expenses are interchangeable terms." *Costner, supra* at 890: "the [Supreme Court] noted that a prevailing relator may recover 'attorney's fees and costs' and that it, the Supreme Court, cited Section 3730(d)(1)-(2) for that proposition." In other words, the contention that the FCA's sections pertained only to "expenses" and not to "costs" was thoroughly cast aside. Moreover, *Costner* cited another case, in its own 8th Circuit, in which its dissent, in discussing "expenses," cited provisions about "expenses" when it stated that "the United States is not liable for any *costs* or attorney fees awarded to the defendants." (Emphasis added.) That inter-mixing of "costs" and "expenses" strongly supported that the notion that "costs" and "expenses" interchangeability had become firmly fixed in our courts' jurisprudence. *United States ex rel. Rodgers v. Arkansas, I154 F.3d 865, 869 (8th Cir. 2000).* (*See also:* On the interchangeability of "costs" and expenses," in *Farmer v. Arabian*, et al., 379 U.S. 227, 232 (1964), the first time that Mr. Justice Black mentioned the word "expenses," he defined them in terms of "costs . . ."

As discussed *supra,* 28 U.S.C. Section 2414 – a code section relied on heavily by *Costner* – makes extensive references to the term "costs," though it did not include the term "costs" in its definitional provision, Section 2412(d)(2), when defining "fees and other expenses." It did not need to, since the term "expenses" was a same-meaning surrogate for "costs." *Costner's* attempt to rationalize why, among a series of FCA provisions and 2412, not all of them in every instance contained the both the "cost" and "expenses" terminology, relied on nothing more than guesswork and speculation. The *Costner* argument was that since Section 3730(d)(4) only used the term "expenses" and did not mention "costs," this omission of costs permitted an award for '"costs" even against a FCA plaintiff who had not been frivolous, vexatious or guilty of harassment. *Costner* argued that since the terms "costs" and "expenses" were both in 3730(g), the absence of the term "costs" from Section 3730(d)(4) was meaningful. But, the inescapable corollary of that rationale, which gave undue influence to the structure of a statute, *i.e.*, Section 3730(d)(4) concerning the omission of "costs," since portions of Section 2412 omit "expenses," and, since Section 3730(g) by its terms incorporates Section 2412, the major portions of Section 2412 that omit of the term "expenses," *i.e.,* Sections 2412(a)(1), 2412(b), 2412(c)(1), 2412(d)(2)(A), and its annotated histories, including "Judicial officers, non-liability for costs," it could be argued that it cannot be considered to refer to "expenses" when it refers to "costs. That argument is untenable. There is no question but that "expenses" were covered by those same Section 2412 provisions, notwithstanding absence of the term "expenses" from the language used by Section 2412. In each situation, the omission of "costs" and "expenses" from certain portions of Section 2412 did not signal anything more than that their absences were unimportant. Since these terms meant the same thing, mentioning them in the same section could be considered redundant. Thus, *Costner's* use of Section 2412 taken from Section 3730(g) to debilitate Section 3730 (d)(4) is ironic, since if *Costner's* rational were sound, Section 3730(g)'s incorporation of Section 2412 meant that significant portions of the statute could not be read as pertaining to "expenses," an outcome that contradicts *Costner's* major argument.

IV. DEFENDANTS' SOUGHT-AFTER "COSTS" FOR DEPOSITION EXPENDITURES AND HURON'S ATTEMPT TO BE ALSO REIMBURSED FOR COPIES FAIL TO QUALIFY FOR PAYMENT

Under Local Civil Rule 54.1(c)(2), for the Defendants Empire and Huron to obtain costs for deposition transcripts, they must have been "transcripts necessarily obtained for use in the case . . .Costs for depositions taken solely for discovery [or investigatory purposes] are not taxable," and cannot be an "expense"/"cost" for which an award can be made.

Realtime Data et al v. CME Group, et al. (2014 U.S. Dist. LEXIS 90944, *22 - *24). "'[T]he filing of a deposition transcript [in connection with a motion for summary judgment] necessarily means a court will 'use' it, since summary judgment may be granted only 'if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Struthers et al. v. City of New York, et al*, 2013 U.S. Dist. LEXIS 137773, *33: "Local Civil Rule 54.1 limits the costs awardable in this district. Rule 54.1(c)(2) permits an award of costs for 'the original transcript of a deposition, and one copy,' if the deposition was received into evidence at trial or used by the court in deciding a dispositive motion."

The Plaintiff does not quarrel with these principles. However, as detailed below, only extremely minor portions of the full depositions for which the Defendants seek to be awarded were presented to, and, thus, necessarily used by the District Court. The Defendants, in conjunction with their respective motions for summary judgment, attached to their motions sharply curtailed portions of all depositions – and thus limited the deposition testimony on which the District Court could rely. No guesswork is need to ascertain the portions of depositions that went beyond the scope of discovery and/or investigatory efforts, and became relevant to the

Court's summary judgment decision. The Defendants had two opportunities to highlight for the Court what the Defendants considered to be the important portions of depositions relative to summary judgment. They were: the shortened versions attached to the summary judgment motion and the references to depositions in both Defendants Rule 56.1 memoranda of undisputed fact. The Defendants should not be heard to seek payment from Plaintiff for portions of depositions that Defendants have themselves discarded when the time came for them to marshal their evidence in support of their summary judgment requests.[3]

The total deposition pages for Empire's twelve witnesses was approximately 1,681 pages, of which the Plaintiff believes 156 pages thereof, or less than 10%, were put into evidence or referenced on its 56.1 memorandum; Huron's fifteen witnesses produced approximately 2,220 pages, of which the Plaintiff believes 281 pages thereof, or less than 13%, were put into evidence by Huron or referenced on its 56.1 memorandum.

Moreover, based on Defendants' invoice-attachments to their requests to tax costs, the all-in cost to each Defendant for their depositions (which entailed heavy non-reimbursable associated expediting costs) amounted to $9,606 for Defendant Empire and $13,893 for Defendant Huron, a total of $23,499, which has been charged by Defendants to Plaintiff. As discussed *infra*, many of the Defendants' costs for which they seek an award are not reimbursable under the rules and decisions.

Particularly painful and seemingly inequitable is that the Plaintiff has been charged by Defendants for each Defendants deposition costs which, if granted, would require Plaintiff to reimburse twice for each deposition, though only minimal portions, 10% (Empire) and 13% (Huron), were viewed as useful by Defendants to their summary judgment arguments.[4]

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[3] These versions of the Defendants' shortened depositions and the Rule 56.1 presentations can be found on the District Court's Docket, namely, for Empire, the deposition Exhibits 117, 125, 118, and 118-2 to 13, and the 56.1 Exhibit 128, and for Huron, the deposition Exhibits 113, 115, 116-4, 5, 7, 9-13, 16, 17 and 20 and the 56.1 Exhibit 114.

Plaintiff has done an analysis for Defendants' submission of its invoice bills for depositions and related costs.[5]

Charts 1, 2 and 3 appear on the following pages.

[4] Plaintiff's work-papers for his deposition cost analysis have been incorporated herein as Chart 1.
[5] These work-papers are incorporated herein as Chart 2 (Empire) and Chart 3 (Huron).

CHART 1

TRANSCRIPT PAGES BILLED BY DEFENDANTS

Witness	Empire Pages	Huron Pages
Landgraber	92	92
Kane	218	218
Weis	193	193
Yorke	185	185
Norwalk	89	89
Yoske	248	248
Hartmann	142	142
Reisman	252	252
Glorioso, Chamberlain,		

Zingaro, O'Connor	262	262	
	1,681	**1,681**	**X2 = 3,362 Sub-Total**
Aloi		201	
Speltz		138	
Amoia		200	
		539	
539			
2,220		**3,901**	**Total Pages both Defendants**

TRANSCRIPT PAGES ENTERED INTO EVIDENCE OR USED IN 56.1 MOTION

Empire	**Huron**	
Landgraber	2	0
Kane	4	71

Weis	7	55	
Yorke	6	48	
Norwalk	6	16	
Yoske	22	0	
Hartmann	17	5	
Reisman	37	8	
Glorioso, Chamberlain, Zingaro, O'Connor	55	8	
	156	**211**	**Sub-Totals: 367**

Aloi
23

Speltz
24

Amoia
23
70 **70**

437 Pages Pages Total Into

CHART 2

DEFENDANT-EMPIRE'S COST SUBMISSIONS

Total Transcripts' Cost Sought	Transcript Witness and Pages	Witness' Transcript-Cost Sought	Transcript's Allowable Items Costs	Transcript's Deletable Costs	Plaintiff's Proposed Revised Transcript-Costs
$9,631.45*					
	Dolly Ann Yorke 185	$1,193.55	Orig & 1 $878.75	Rough ASCII $277.50	
				Reporter Fee $90.00	
				Exhibits $24.80	
				Witness Total: $392.30	**$801.25**
	Steven Landgraber 92	$415.30	Orig & 1 $345.00	Scanning to CD $53.75	
				Postage & Handling $16.55	
				Witness Total: $70.30	**$345.00**
	Eric Yospe 248	$1,072.50	Orig & 1 $1,054.00	Shipping & Handling $20.00	
				Witness Total:	**$1,052.50**

				$20.00	
	Cheri Kane **218**	$1,003.45 - excludes $275.00 video	Original $577.70	Exhibit $43.75	
				ASCII $327.00	
				Processing $55.00	
				Witness Total: $425.75	**$577.70**
	Steven Hartmann 142	$1,212.20	Original $461.50	3-5 day Delivery $426.00	
				Evening Pages $15.00	
				Rough ASCII $248.50	
				Exhibit $11.20	
				Shipping & Handling $50.00	
				Witness Total: $750.70	**$461.50**
	Leslie Norwalk 89	$310.75	Original $289.25	Exhibits $1.50	
				Shipping & Handling $20.00	
				Witness Total: $21.50	**$289.25**

	Kevin Glorioso; **Christine Chamberlain;** **Michael Zingaro; and** **Sandra O'Connor** **262 for all 4**	$1,473.10	Originals $851.50	3-5 day Delivery $524.00	
				Exhibits $27.60	
				Shipping & Handling $70.00	
				Witness Total: $ $621.60	**$851.50**
	Timothy Weis 193	$818.10	Original $646.55	Exhibit $116.55	
				Processing $55.00	
				Witness Total: $171.55	**$646.55**
	Peter Reisman 252	$2,107.50	Original $819.00	Daily Delivery $819.00	
				Rough ASCII $378.00	
				Exhibits $61.50	
				Shipping & Handling $30.00	

				Witness Total: $1,288.50	**$819.00**
Filing Fee		$25.00			**$25.00**
GRAND TOTALS:	**Total Costs Submitted By Defendant: $9,631.45**			**Plaintiff's Total Dis-Allowable Costs: $3,608.20**	**Potential Total Allowable Costs: $6,023.25****
*Defendant-Empire's total amount is wrong, it should have been $9,631.45, not $9.759.30. Its error was the ** None is allowable under Sections3730(d)(4) if allowable "costs" are barred because of Section 3730(d)(4)'s	inclusion of an interest charge of $127.85 it submitted as a "cost." protections of Relator/Whistle-blowers' litigation that is neither frivolous, vexatious nor harassment.				

CHART 3

DEFENANT-HURON'S COST SUBMISSIONS

Total Transcripts' Cost Sought	Transcript Witness and Pages	Witness' Transcript-Cost Sought	Transcript's Allowable Items Costs	Transcript's Deletable Costs	Plaintiff's Proposed Revised Transcript-Costs
$14,043.46*					
	Steven Landgraber 92	$779.25	0/1 copy. exp. $529.00	Reporter's appearance $180.00	
				Scanning to CD $53.75	
				Postage & Handling $16.50	
				Witness Total: $250.25	**$529.00**
	Bonnie Amoia 200	$434.00	Orig & 1 $200	Two extra copies $100 (est.)	
				Handling fees $10.00	
				Witness Total: $110.00	**$324.00**
	Cheri Kane 218	$1,735.93	Original $861.10	Next day Delivery $776.08	
				Exhibit $43.75	
				Processing $55	
				Witness Total: $874.83	**$861.11**

	Timothy Weis 193	$1,746.43	Original $926.40	3 day Delivery $648.48	
				Exhibit $115.55	

				Processing $55.00	
				Witness Total: $820.03	**$926.40**
	Dolly Ann Yorke 185	$871.80	Original $601.25	Rough ASCII $231.25	
				Exhibits $9.30	
				Shipping & Handling $30.00	
				Witness Total: $270.55	**$601.25**
	Leslie Norwalk 89	$549.60	Original $289.25	2 Day Delivery $244.75	
				Shipping & Handling $15.00	
				Witness Total: $259.75	**$289.85**
	Eric Yospe 248	$1,516.00	Original $806.00	2 Day Delivery $682.00	
				Scan $13.00	
				Shipping & Handling # 15.00	

				Witness Total: $710.00	**$806.00**
	Steven Hartmann 142	$1,186.90	Original $461.50	3-5 Day Delivery $426.00	
				Evening pages $15.00	
				Rough ASCII $248.50	
				Exhibits $1.70	
				Exhibits $4.20	
				Shipping & Handling $30.00	
				Witness Total: $725.40	**$461.50**
	Kevin Glorioso; Christine Chamberlain; Michael Zingaro; and Sandra O'Connor **262 for all four**	$1,425.85	Original $851.50	3-5 Day Delivery $524.00	
				Scan $10.35	
				Shipping & Handling $40.00	
				Witness Total: $574.35	**$851.50**

	Tamra Aloi 201	$1,771.65	Original $653.25	Daily Delivery $904.50	
				Evening pages $180.00	
				Scan $16.40	
				Shipping Handling $17.50	
				Witness Total: $1,118.40	**$653.25**
	David Speltz 138	$1,002.45	Original $448.50	3-5 day Delivery $517.50	
				Exhibits $6.45	
				Shipping & Handling $30.00	
				Witness Total: $553.95	**$448.50**
	Peter Reisman 252	$873.60	Original $819.00	Exhibits $24.60	
				Shipping & Handling $30.00	
				Witness Total: $54.60	**$819.00**

	Reporter's fee	$150.00		**Witness Total:$150.00**	**0**
	Clerk's Fees	**$50.00**	**$50.00**		**$50.00**

GRAND TOTALS:	**Total Costs Submitted By Defendant: $14,093.46**			**Plaintiff's Total Dis-Allowable Costs: $6,471.11**	**Potential Total Allowable Costs: $7,621.36****
*Defendant-Huron's total amount is wrong, it should have been $14,093.46, not $14,043.46. Its	error was its exclusion of Clerk's fees of $50.00. from Huron's assertion of total allowable "costs."				
** None is allowable under Sections3730(d)(4) if allowable "costs" are barred because of Section 3730(d)(4)'s	protections of Relator/Whistle-blowers' litigation that is neither frivolous, vexatious nor harassment.				

Were the Plaintiff ordered to pay deposition costs, which, of course, he strenuously objects to, (1) he should pay nothing because of the bar to his payment required by Section 3730(d)(4), *supra,* and (2) he should not be required to pay for deposition-related services not allowed for reimbursement nor should he pay, in accordance with the Defendants representations, for the non-usable 90% (Empire) and for the non-usable 87% (Huron) portions of the depositions.

Were Plaintiff ordered to pay for 100% of the depositions – a punitive and inequitable result as discussed *supra* - his analysis of the Defendants' submitted bills, charts 2 and 3, is that $3,608.20 of Empire's deposition-ensemble charges of $9,631.45 is disallowable and $6,471.11 of Huron's deposition-ensemble charges $14,043.45 is disallowable. The grounds for Plaintiff's requests for disallowance are set forth in the attached Charts 2 (Empire) and 3 (Huron).

Plaintiff's disallowance amounts are consistent with case law, applicable rules (including Local Rule 54.1 and Rule 54 of the Fed. Rules Civ. P) and Congress' and the courts' insistence of support for, and encouragement of, whistleblowers who reliably report allegations of fraud against government.

In *Brown v. City of New York,* 2014 U.S. Dist. LEXIS 30094, *10, *14, *16, it was held that, "However, the mere 'use of the transcripts during trial . . . does not mean they were 'necessarily obtained. . . . Defendants cite only three instances in which the transcripts were referenced by the Court or the parties."

"Importantly, the Court also adheres to Supreme Court precedent that indicates the taxing of costs is to be administered 'in a very limited way.' . . . *Crawford Fitting, supra* at 44. It has been explained that, " . . . .taxable costs are limited to relatively minor, incidental expenses." *Taniguchi v. Kan Pac. et al.* 132 S. Ct5. 1997, 2006 (2012). In *Omeprazole et al. v. LEK, et al*, 2012 U.S. Dist. LEXIS 160057, *13 (S.D.N.Y.), the Court warned that, "The Supreme Court has cautioned that 'the discretion given district judges [by Rule 45(d)] to tax *costs should be sparingly exercised with reference to expenses* not specifically allowed by statute.'" (Emphasis added.)

A cost for copying asserted by Huron is a palpably ridiculous request. All that Huron submitted was a list of sixteen groups of alleged papers and their printing charges. Absolutely no details were provided: did the pages pertain to the defense; were the originals unavailable; the manner in which the copies advanced the defense; whether the copies were ever provided to the opposition or the Court; to whom the costs were paid; what were the usages of the copies; how did the copies relate to deposition testimony or the 56.1 presentations; was a single page of approximately 50,000 pages ever submitted for or introduced into evidence, and so forth. This demand for $10,150.50 deserves to be rejected out of hand. In fact, it may provide insight into how careless, cavalier and lackadaisical the Defendant has been in submitting greatly exaggerated demands for payment.

The cases restrict the payment of awards for certain deposition and copying costs:

1) *Farberware et al v. Meyer, et al.,* 2009 U.S. Dist. LEXIS 121323, *15, *17-*19 held that: "Pursuant to Local Rule 54.1, the cost of an original deposition transcript and *one* copy is taxable . . ." (Emphasis added.) However, "certain associated fees that are not necessary generally may not be taxed – for example, expedited services, delivery costs, appearance fees and rough diskettes and/or ASCII disks. . . . a value added, expedited transcript

services – is rarely recoverable as a "cost. . . . Denying costs for overnight shipping because 'not only is the cost unnecessary, but shipping fees are not provided for under Local Civil Rule 5.1 . . .any taxable costs related to depositions do not cover an 'miscellaneous' expenses."

2) *Whitfield v. Scully,* 241 F.3d 264, 270 (2nd Cir. 2001) held that: Regarding deposition costs, "[c]onstruing this provision [Fed. R. Civ. P. 54(d)(1), the Supreme Court has held that the term "costs' includes only the specific items enumerated in 28 U.S.C. Section 1920," such as "the original transcript of a deposition, plus one copy . . ."

3) *Palm Bay, et al v. Marchesi Di Barolo, et al,* 285 F.R.D. 225, 235, 238, 238 (E.D.N.Y. 2012) directed that: Original transcript and one copy. "Local Rule 54.1(c)(5) provides . . . A copy of an exhibit is taxable if the original was not available and the copy was used or received in evidence. The cost of copies used for the convenience of counsel or the Court are not taxable." ". . . [T]he invoices reveal in-house copy charges . . . for copies that were used for internal purposes. . . . There is no statement [in the Defendant's Memorandum, nor did Defendant Huron provide one, either] that the copies were 'necessarily obtained for use in the case.' All that is stated in support of this request for $26,423.75 in taxable costs, is that the copying costs is a 'reasonable expense' and, 'the photocopying Costs are reasonable and permissible under the Rules given the length of the case and the number of documents involved. . . .taxable costs for exemplification and copying costs, is denied."

CONCLUSION

For the reasons herein, Defendants' requests for tax cost awards should be denied in their entirety.

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Respectfully submitted,

Philip R. Michael
Counsel to Plaintiff
Michael Law Group
The Chrysler Building
405 Lexington Avenue, 7th Floor
New York, N.Y. 10174
((917) 689-1734
Phil.michael.law.group@gmail.com

cc: Michael J. Tuteur and Michael D. Leffel, Counsel to Empire

Robert S. Salcido, Counsel to Huron